

that the merger of AT&T with Teleport is likely to have any adverse competitive effects due to vertical aspects of the merger.

45. We also reject Sprint's argument that the merger would accelerate the pace of vertical integration by long distance companies and competitive access providers, thus reducing the availability of competitive access services.¹⁴⁵ While there may be independent reasons why long distance carriers and competitive access providers may want to integrate vertically, we see no evidence in the record suggesting that such a desire is motivated primarily, or at all, by the announced merger of AT&T and Teleport. More importantly, as discussed above, we find that a primary benefit of the merger is that it will increase the competitive choices available to customers for services, including access, more quickly than would occur absent the merger.

46. Finally, because we conclude that the vertical aspects of the merger are not likely to produce any anticompetitive effects, we also reject Sprint's argument that the Commission should only approve the merger subject to the conditions that: (1) Teleport is maintained as a separate entity, and (2) Teleport is subject to nondiscriminatory access requirements.¹⁴⁶ We note in this regard that the merged entity will remain subject to Sections 201 and 202 of the Communications Act, and any party that believes itself aggrieved by alleged discriminatory behavior can seek recourse from the Commission under Section 208 of the Act.¹⁴⁷

F. Potential Public Interest Benefits

47. In this case, the applicants have not proffered evidence of any specific cost savings or quantifiable synergies that would result from the merger. They do contend generally, however, that combining Teleport's local facilities and its extensive experience in penetrating local markets with AT&T's brand-name recognition and marketing expertise, financial resources, and efficiencies from the merger will produce a substantially more formidable local competitor than either Teleport or AT&T could be alone.¹⁴⁸

¹⁴⁵ Sprint Petition for Investigation at 2-3.

¹⁴⁶ Sprint Petition for Investigation at 5-6.

¹⁴⁷ 47 U.S.C. §§ 201, 202, 208. Sections 201 and 202 state, *inter alia*, that interstate common carriers must provide service on just, reasonable, and nondiscriminatory terms and conditions; Section 208 permits aggrieved parties to file complaints with the Commission regarding, *inter alia*, alleged violations of Sections 201 or 202. *Id.*

¹⁴⁸ AT&T Reply Comments at 1. In particular, Applicants assert that the proposed merger should: (1) enhance development of facilities-based local competition by taking advantage of the complementary aspects of AT&T's long distance and wireless networks and marketing expertise, and Teleport's local fiber optic and broadband wireless capabilities and rights-of way; (2) accelerate and expand AT&T's provision of facilities-based local exchange service, primarily to business customers and to multiple dwelling units in high density markets currently served by Teleport; and (3) enhance the merged entity's ability to provide end-to-end service to broader classes of customers by enabling AT&T to tap the experience and expertise of Teleport's management team to lead the company's overall local entry strategy for business and residential markets. *Application* at 8.

48. Although Applicants have not quantified or substantially supported the public interest benefits that may result from the merger, we are persuaded that, as a result of the merger, the combined entity likely will be able to expand its operations and enter local markets more quickly than either party could do absent the merger. As the Commission specifically found in the *Bell Atlantic/NYNEX Order*, AT&T has a strong brand name reputation in the provision of telephone service to the mass market, as well as a substantial base of residential, long-distance customers.¹⁴⁹ These capabilities will now be combined with Teleport's local facilities and expertise and knowledge in providing local services. Even though the record is sparse, we believe these benefits warrant approval of the merger in light of our finding that the merger is unlikely to result in any anticompetitive effects.¹⁵⁰

G. Other Issues

49. Potential Harm to Residential Customers. Commenters contend that Applicants will target the business market to the detriment of residential consumers, particularly residential customers in low-income, predominantly minority communities.¹⁵¹ Inner City Press argues, therefore, that the proposed merger should be denied unless it will foreseeably result in benefits to a fair cross section of the residents of the affected markets.¹⁵² On the other hand, another public interest group, the Greenlining Institute and Latino Issues Forum, claims that the proposed merger is likely to have a positive impact on the development of local competition within the growing minority business market, given AT&T's past marketing performance within the minority community.¹⁵³

50. Although we find that the proposed merger may, at the outset, increase competition primarily in the more lucrative business markets, we disagree that the proposed merger will harm residential consumers. The record contains no evidence suggesting that the proposed merger will exacerbate the current disparity in the level of competition between the local mass market and the local larger business market. Moreover, in their applications, Applicants have explicitly identified a set of residential customers that will be served immediately, and thereafter, by the merged entity -- customers that live in "multiple dwelling

¹⁴⁹ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20029-31, ¶¶ 82-84. The Commission based its finding, in part, on customer preference surveys.

¹⁵⁰ *Cf. Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, ¶ 157 ("As the harms to the public interest become greater and more certain, the degree and certainty of the public benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest, convenience and necessity").

¹⁵¹ BellSouth Petition for Approval with Conditions to Protect the Public Interest at 7; Keith Maydak Reply at 5; Inner City Press Petition to Deny at 1-2.

¹⁵² Inner City Press Petition to Deny at 2-7. *See also* Keith Maydak Petition to Deny at 1-2 (stating that the merger would not be in the public interest because it would interfere with other carriers' ability to compete and would harm consumers).

¹⁵³ Greenlining Institute and Latino Issues Forum Comments at 2.

units in high density markets."¹⁵⁴ For these reasons, we reject the argument that the application should be denied based on its potential impact on residential consumers.

51. BellSouth also argues that the proposed merger will harm residential customers by transferring traffic from the public switched network to Teleport's facilities, thereby significantly reducing funds available to support universal service.¹⁵⁵ We find no merit in this argument. Even as the provider of a private network, Teleport is required to make universal service contributions. Pursuant to Section 254(d) of the Communications Act, the Commission has held that "private service providers that offer their services to others for a fee" are required to contribute to universal service.¹⁵⁶

52. Certain commenters also assert that the proposed merger would harm the public interest because, as a result of the merger, AT&T would become the largest international and alternative local exchange carrier, giving it an advantage over other carriers.¹⁵⁷ We reject this argument. As the Commission has previously noted, in determining whether a merger serves the public interest, the issue is not whether the merged entity will have competitive advantages over its rivals, but rather whether any such advantages will be so great as to impede the effective functioning of a competitive market.¹⁵⁸

53. AT&T's Shared Customer-Provided Access Policy. Ameritech objects to the proposed acquisition of Teleport because of AT&T's allegedly discriminatory and

¹⁵⁴ *Application* at 8; AT&T Reply Comments at 21-22. We also are not persuaded by commenters' arguments that the applications should be denied because the public interest showing was insufficient. *See, e.g., BellSouth Motion to Dismiss* at 1-7. We do, however, urge parties filing for transfers of control to provide, in their initial papers, a complete and detailed public interest statement in order to facilitate the Commission's analysis of the competitive effects of the proposed transaction. Providing the information in the initial application avoids unnecessary delay of our review process, and affords parties a meaningful opportunity to comment. AT&T's and Teleport's public interest statement, in their initial papers, falls short of the level of detail the Commission seeks in order to perform a comprehensive merger analysis. We conclude that the initial application in this case, as supplemented by Applicants' reply and *ex parte* filings to which interested parties had an opportunity to respond through the *ex parte* process, provides us with sufficient information to perform our analysis.

¹⁵⁵ BellSouth Petition for Approval with Conditions to Protect the Public Interest at 7-8.

¹⁵⁶ *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 9183 (1997) (subsequent history omitted).

¹⁵⁷ Letter from Lisa Orlic to the Secretary, Federal Communications Commission (dated February 19, 1998) (Docket No. 98-24); Charles Fullenwiley Petition to Deny at 1.

¹⁵⁸ *BT/MCI Order*, 12 FCC Rcd at 15410, ¶ 156; *Competition in the Interstate Interexchange Marketplace, Report and Order*, 6 FCC Rcd 5880, 5891-92 (1991). We note that one commenter filed a two-paragraph letter in which he argues that, in light of AT&T's proposed takeover of Telecommunications, Inc., the Commission should seek additional comments and consider imposing conditions on the proposed acquisition of Teleport by AT&T. We reject this request. Petitioner has provided no basis for further delaying authorization of this merger. *See* Petition to Allow a Supplemental Comment Period in Light of Announcement of Takeover of Telecommunications Inc., filed by Keith Maydak on July 2, 1998.

anticompetitive Shared Customer-Provided Access (SCPA) policy. This policy requires competing providers of dedicated access services to interconnect with AT&T by bifurcating their own networks and installing redundant sets of equipment in two different collocation spaces in AT&T's points-of-presence (POPs).¹⁵⁹ Ameritech urges the Commission to either delay approval of the proposed merger until the Commission has granted the relief requested in certain pending complaint proceedings, or grant the merger application on the condition that AT&T agrees not to charge competing carriers rates for interconnection that are any greater than the costs incurred by AT&T to provide such interconnection to Teleport.¹⁶⁰

54. We conclude that approval of the applications should not be contingent on resolution of the pending complaints or subject to the condition proposed by Ameritech. The record shows that the concerns over the discriminatory aspects of AT&T's SCPA policy have been resolved by subsequent actions taken by the parties as part of formal complaint proceedings pending before the Commission.¹⁶¹ In those proceedings, AT&T has committed to modifying, on a prospective basis, its SCPA policy to eliminate the requirement that competing access providers have separated, dual facilities for dedicated access equipment located at AT&T's POPs.¹⁶² The only issues remaining between the parties relate to past damages claimed by Ameritech, what charges are appropriate, and whether space, power, and other amenities for access interconnection facilities in AT&T's POPs that are subject to the SCPA policy constitute Title II service and should be tariffed.¹⁶³ Because AT&T has committed to abandon the practice that is the subject of Ameritech's complaint, we need not address the issue here. We expect, however, that AT&T will abide by its commitment to change its SCPA policy, as described above.

55. Other Alleged Misconduct by AT&T. Several commenters assert that we should disapprove the proposed merger or impose conditions on it because AT&T regularly engages in "slamming,"¹⁶⁴ deceptive advertising practices, and discriminatory pricing.¹⁶⁵ We find that

¹⁵⁹ Ameritech Reply at 1-2, 6-7. One set of equipment must be used only for interconnecting dedicated access service provided to AT&T, while the second set of equipment must be used for interconnecting all dedicated access service provided to any customers other than AT&T (*e.g.*, end-user customers who want to use Ameritech for dedicated access service but need to connect to the AT&T POP because AT&T is their interexchange carrier). *Id.*

¹⁶⁰ Ameritech Reply at 7.

¹⁶¹ *Illinois BellTel. Co., et al. v. AT&T Corp.*, File No. E-98-35; *New England Telephone & Telegraph Company v. AT&T Corp.*, File No. E-97-01. See AT&T May 6, 1998 *ex parte*.

¹⁶² See, *e.g.*, AT&T May 6, 1998 *ex parte* at 2. See also AT&T Main Brief, E-97-01 at 6-7 (April 4, 98); Joint Stipulation, Attachment A at 3-4, E-98-35 (Apr. 4, 1998).

¹⁶³ AT&T May 6, 1998 *ex parte* at 6.

¹⁶⁴ Slamming is "[t]he practice of switching a telephone customer's long distance supplier without obtaining permission from the customer." Newton's Telecom Dictionary (13th ed. 1998).

commenters' conclusory allegations regarding AT&T's service do not raise substantial and material questions of fact regarding AT&T's qualifications or the public interest benefits of the proposed merger, and that the public interest would not be served by our withholding action on the proposed merger.

IV. CONCLUSION

56. For all the foregoing reasons, we conclude that Applicants have carried their burden of showing that the proposed merger will serve the public interest, convenience and necessity. Accordingly, we hereby grant the Applications.

V. ORDERING CLAUSES

57. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the applications filed by AT&T Corp. (AT&T) and Teleport Communications Group Inc. (Teleport) in the above-captioned proceeding ARE GRANTED.

58. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for AT&T to acquire control of

- a) any authorization issued to Teleport's subsidiaries and affiliates during the Commission's consideration of the transfer of control applications and the period required for consummation of the transaction following approval;
- b) construction permits held by licensees involved in this transfer that mature into licenses after closing and that may have been omitted from the transfer of control applications; and
- c) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.¹⁶⁶

59. IT IS FURTHER ORDERED that all references to AT&T and Teleport in this Order shall also refer to their respective officers, directors and employees, as well as to any affiliated companies, and their officers, directors and employees.

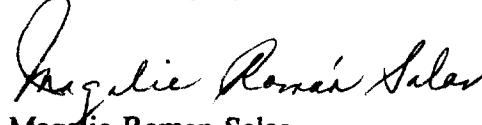
¹⁶⁵ See, e.g., Inner City Press Petition to Deny at 5; JMJ Associates Inc. Comments at 1 (alleging that AT&T has responded to informal complaints from the public in a disingenuous manner); Charles Fullenwiley Petition to Deny (alleging that AT&T engages in deceptive marketing practices); Keith Maydak Petition to Deny (accusing AT&T of engaging deceptive practices including slamming, tariff swaps, and tying arrangements).

¹⁶⁶ AT&T/McCaw Order, 9 FCC Rcd at 5909 n.300.

60. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the "Motion to Dismiss" of BellSouth, "Petitions to Deny" of Charles Fullenwiley, Keith Maydak, and Inner City Press/Community on the Move and Inner City Public Interest Law Project, the "Petition for Approval with Conditions to Protect the Public Interest" of BellSouth, the "Petition for Investigation and Other Relief of Sprint" and the "Petition to Allow a Supplemental Comment Period in Light of Announcement of Takeover of Telecommunications Inc." of Keith Maydak ARE DENIED.

61. IT IS FURTHER ORDERED, that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release, in accordance with 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION


Maggie Roman Salas
Secretary

**SEPARATE STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: For Consent to Transfer Control of Teleport Communications Group Inc. to AT&T Corp.; CC Docket No. 98-24 .

I support today's decision approving the proposed merger between Teleport Communications Group and AT&T Corp. I concur in its results and explicitly approve of the decision not to impose any conditions on the merger. I write separately, however, to express my concerns with several aspects of the underlying reasoning and my unwillingness to adopt the proposed framework for analyzing mergers. Let me be clear, I recognize that much work has been put into this Order by the Commission staff and I applaud their efforts. In general, I find that they have done an exceptional job of analyzing the competitive effects of the merger in the relevant markets.

Due to what I would characterize as poor internal Commission processing, however, this item was not formally circulated to the Commissioners until more than three months after it had cleared Department of Justice review. I voted for this item within 48 hours of receiving it, and I have prepared this statement as rapidly as possible. Under optimal circumstances, I would prefer to discuss the merits of the framework that we use here to approve this merger. For example, how exactly does the Commission's definition of relevant markets and its analysis of the competitive effects of the merger on those markets differ from the Department of Justice's analysis? To the extent that it is materially different, what is the Commission's express statutory authority or unique expertise to perform such a review? If the analysis is not materially different, then why is it not redundant for this agency to repeat an analysis that numerous experts at the Department of Justice already perform? Can the Commission's precluded competitor framework apply to a market that has already been deregulated and the largest competitors declared non-dominant? Under the precluded competitor framework, is our analysis of potential competitors too speculative -- especially since we do not seem to require the same type of evidence as the Department of Justice's merger guidelines would require of intent to enter the market by another means? Is there any limit on the additional Public Interest benefits that the Commission examines to determine whether a merger is in the public interest? Seeing this item for the first time after such an inordinate delay, however, is not the optimal circumstance.

Had there been more of an opportunity for discussion, I may have been persuaded that these questions had been adequately addressed. Regrettably, that opportunity was not presented until too late in the process for an application that does not appear to raise any serious contentions.

I do not support the Commission's use of the framework used in this item. I hope that we do not repeat its use in the future.